2006

Traco Steel Erectors Inc. v. Comtrol Inc. : Brief of Appellee

Utah Court of Appeals

Cass C. Butler; Michael D. Stanger; Callister Nebeker and McCullough; Attorneys for Appellee.
Ralph R. Tate; Stephen B. Doxey; Attorneys for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

TRACO STEEL ERECTORS, INC.,	)	
Plaintiff and Appellant,	)	Case No. 20060916-CA
v.	)	District Court No. 040911076
COMTROL, INC,	)	
Defendant and Appellee	)	

APPELLEE'S BRIEF

On Appeal From the Third District Court
in and for Salt Lake County, State of Utah
Judge Tyrone E. Medley

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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PARTIES TO THE PROCEEDINGS BELOW

In addition to Appellant Traco Steel Erectors, Inc. and Appellee Comtrol, Inc., the following were parties to the proceedings below:

1. Gos's Welding, Inc.

2. Dwamco, Inc.

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STATEMENT REGARDING JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2-2(3)(j) and UTAH CODE ANN. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Whether Appellant's appeal of the Trial Court's findings must be denied because Appellant failed to marshal the evidence supporting the Trial Court's findings.

Standard of Review: Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires "[a] party challenging a fact finding [to] first marshal all record evidence that supports the challenged finding." United Park City Mines v. Stichting Mayflower Mountain Fonds, et al., 2006 UT 35, ¶ 24, 140 P.3d 1200 (2006); see also, State v. Clark, 2005 UT 75, ¶ 17, 124 P.3d 235; Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶ 21, 54 P.3d 1177. To pass this threshold, parties protesting findings of fact must "marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Clark, 2005 UT 75, ¶ 17

Issue 2: Whether the Trial Court erred in granting summary judgment to Appellee on the Army Reserve Project, in light of the submission of the sham Affidavit of Tracy Bronson, which contained statements not based on personal knowledge, and in direct contradiction to Mr. Bronson's deposition testimony.

Standard of Review: Correctness. See, Gary Porter Const. v. Fox Const., Inc., 101 P.3d 371, 374 (Utah Ct. App. 2004). In reviewing summary judgment rulings, appellate

courts will not consider fact issues raised by affidavits which contradict the affiant's deposition testimony. Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 71 (Utah 1998).

Issue 3: Whether the Trial Court erred in awarding damages to Appellee.

Standard of Review: The amount of damages awarded by a trial court may only be reversed on appeal if clearly erroneous. See, Mahana v. Onyx Acceptance Corp., 96 P.3d 893 (Utah 2004); Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc., 121 P.3d 24 (Utah Ct. App. 2005).

Issue 4: Whether the Trial Court erred in concluding that contractual provisions which barred change orders that were not submitted in writing and approved by specific employees of Appellee, barred Appellant's attempts to recover on the unsigned change orders for alleged work beyond the scope of the original agreement with Appellee.

Standard of Review: Correctness. See, Interwest Const. v. Palmer, 923 P.2d 1350, 1359-60 (Utah 1996).

Issue 5: Whether the Trial Court erred in concluding that lien releases executed by Appellant which state that Appellant was releasing "all rights to . . . claims . . . for labor and materials furnished on or before [date]" were enforceable as a waiver of Appellant's claims for work predating those releases.

Standard of Review: Correctness. See, Interwest Const. v. Palmer, 923 P.2d 1350, 1359-60 (Utah 1996).

Issue 6: Whether the Trial Court erred in awarding attorneys' fees to Appellee, after determining that it was the prevailing party.

Standard of Review: A trial court's determination of the prevailing party is reviewed for abuse of discretion. Lunceford v. Lunceford, 139 P.3d 1073 (Utah Ct. App. 2006); The amount of attorneys fees is only reversible upon a finding of patent error or clear abuse of discretion. Jensen v. Sawyers, 130 P.3d 325, 348 (Utah 2005).

DETERMINATIVE PROVISIONS, STATUTES, RULES AND REGULATIONS

UTAH R. CIV. P. 56(e)

UTAH R. APP. P. 24(a)(9)

STATEMENT OF THE CASE

This case involved claims by Appellant, a steel erector subcontractor, Traco Steel Erectors, Inc. ("Traco") against Appellee, a general contractor, Comtrol, Inc. ("Comtrol"), and counterclaims by Comtrol. The disputes related to three separate projects, a U.S. Army Reserve Center, the U.V.S.C. Student Center Expansion, and the Ethel Wattis Kimball Arts Center at Weber State University.

Traco's claims against Comtrol were based primarily on change orders. Comtrol defended against the claims by asserting that Traco had not followed the change order procedures set forth in the subcontracts between Comtrol and Traco, and that Traco had waived the right to collect on many of the change orders by signing lien releases.

Comtrol's claims against Traco related to damages incurred when Comtrol had to finish Traco's work after Traco abandoned the projects. Traco asserted that it was justified in leaving the jobs because of Comtrol's failure to pay the disputed change orders. Comtrol received summary judgment on the U.S. Army Reserve Project on the basis that the final

Change Order that Traco had signed set forth the contract balance, and showed that Traco had been overpaid by more than $9,000.

At trial, Comtrol prevailed against Traco's change order claims, with the Trial Court ruling that the provisions of the contract, as well as Traco's lien releases, barred recovery. After a careful and complete review of the evidence, the Trial Court found that Traco had not been justified in abandoning the jobs, and awarded Comtrol most of its requested damages for completing Traco's work, reducing certain of the costs that the Trial Court found excessive.

FACTS RELEVANT TO ISSUES ON APPEAL

1. Comtrol is a General Contractor and Traco is a steel erector subcontractor. (R-7, Complaint at ¶ 24). Traco and Comtrol entered into similar Subcontractor Agreements for the construction of three separate projects: (1) the U.S. Army Reserve Contract, (R-190-94); (2) the UVSC Student Center Expansion (D. Ex. 51); and (3) the Weber State Visual Art Center (D. Ex. 1).

2. Each of the Subcontractor Agreements had the following five provisions:

> 11. Scheduling: Subcontractor has examined, and approved of, the preliminary project schedule. During the progress of the work Subcontractor will promptly supply to Contractor all scheduling information required by Contractor. Subcontractor will promptly review and comply with all revised schedules issued by Contractor. Subcontractor will employ an increased work force and overtime, if necessary, to comply with the Contractor's scheduling requirements. No extra compensation will be paid to Subcontractor for the additional work force or overtime in the absence of written agreement by Contractor to reimburse such costs.
>
> 13. Commencement and Progress: Subcontractor will commence work within three days after telephone or written notice from Contractor to do so,

and shall prosecute the work diligently and in accordance with Contractor's project schedule.

16. No Damages for Delay to Subcontractor: Subcontractor will complete all work required under this Subcontract pursuant to Contractor's project schedule. In the event that Subcontractor is obstructed or delayed in its performance of its work by Contractor or Owner, Subcontractor will be entitled to a reasonable extension of time. It is agreed that the extension of time will be subcontractor's sole and exclusive remedy for such obstruction or delay, and that in no event will the Subcontractor be entitled to recover damages from Contractor or Owner for such obstruction or delay. Notwithstanding the foregoing, if the delay is caused by the Owner, Contractor shall not be obligated to extend Subcontractor's time for any greater length of time that the Contractor's time is extended by the Owner for the delay.

18. Mutual Responsibility of Subcontractors: Subcontractor accepts mutual responsibility, along with Contractor and all other subcontractors on the project, for the prompt, efficient, and coordinated progress for the work. Subcontractor will keep itself informed as to the progress of Contractor and other subcontractors, and will coordinate its operations with Contractor and other subcontractors so as to facilitate the progress of the work. In the event of conflict between subcontractors as to access to work areas, coordination, or scheduling, the orders of the Contractor shall be followed.

26. Changes: Contractor may add to or subtract from the scope of Subcontractor's work by written change order, and the Subcontractor will promptly perform the work as modified. If the Subcontractor contends that a change order results in a net increase in the Subcontractor's cost of performing the work, Subcontractor will promptly, within ten days after the issuance of the change order provide Contractor with a detailed estimate of the additional cost. The parties will then negotiate an equitable adjustment to the subcontract price. If agreement is not reached as to the amount by which the subcontract price should be adjusted, Subcontractor will continue performance of the change order, and the amount of the adjustment will be determined later. Change orders must be issued only in writing. The only person with authority to issue change orders on behalf of the Contractor is Brian Burk or Ralph Burk. The authorized person may be changed by written notice. Notwithstanding the foregoing, Contractor shall not be obligated to

Subcontractor for any amount greater than Contractor receives from the Owner for the change.[1]

31. Contractor's Right to do Subcontractor's Work: If Subcontractor fails to supply sufficient forces, equipment or materials to advance the work according to Contractor's schedule, then Contractor may use its own forces, equipment, or materials to supply such portions of the work as are necessary to increase the rate of progress, and Contractor shall deduct the expense, with reasonable overhead and profit, from the subcontract price.

34. Default. In the event that Subcontractor appears likely to be unable to complete its work according to Contractor's project schedule, or if Subcontractor fails to fully perform its duties under this Subcontract, or if Subcontractor becomes insolvent, or fails to supply sufficient forces to maintain this schedule, or is guilty of any other default under this Subcontract, then Contractor may (a) withhold payment for work performed under this Subcontract and withhold payment of any other obligation of Contractor to Subcontractor; (b) after giving 48 hours written notice to Subcontractor, eject Subcontractor and take over Subcontractor's work and terminate Subcontractor's right to perform under the Subcontract. If Contractor takes over Subcontractor's work, then Contractor will charge Subcontractor for all costs incurred as a result, including reasonable overhead and profit and including attorney's fees and other expenses. If the total amount exceeds the unpaid balance of the Subcontract, then Subcontractor shall pay the difference to Contractor. If the amount is less than the unpaid balance of the Subcontract, the excess shall be paid by Contractor to Subcontractor.

If Contractor takes over Subcontractor's work, Subcontractor shall permit Contractor to take possession of all of Subcontractor's materials, equipment, tools, and appliances at the jobsite for the purposes of completing Subcontractor's work. Subcontractor will cooperate with Contractor to facilitate an orderly take-over.

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[1]For the U.S. Army Reserve subcontract, this paragraph had one difference, in that the names of the persons authorized to approve Change Orders on behalf of Comtrol were omitted, with only a blank, such that the sentence read "The only person with authority to issue change orders on behalf of the Contractor is _____." [Left blank in original] (R-192).

3. In addition the UVSC and Weber State Subcontracts contained the following language:

> Any additional work performed, under which you may issue a claim against your contract on this project, must be submitted in writing within (10) days of discovery of the change. If you proceed on verbal instructions, you proceed at your own risk.[2]

4. In addition to the projects at issue in this case, Traco had previously served as a subcontractor on several projects for Comtrol. (R-900).

5. Comtrol's standard change order form contains accord and satisfaction language and an entry that sets forth the revised contract amount created by that change order. (R-900; see, e.g., R-240).

6. This change order form was used on each project at issue in this case, and in each of the other jobs Traco had worked for Comtrol. All change orders signed by Traco representatives and the authorized Comtrol representative (Brian Burk), in this case were on this form, and in each case, the change order set forth the revised contract amount created by that change order. (R-900-901).

7. On all projects, and with respect to all subcontractors, Comtrol consistently enforces the requirements: (1) that requests for change orders be submitted in writing, (2) that change orders be submitted within ten days of the discovery of the change, and (3) that

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[2] In the UVSC Contract (D. Ex. 51), this language appears in Attachment A-1 at Paragraph 11, and in the Weber State Contract (D. Ex. 1), it appears in Attachment A-1 at Paragraph 12.

change orders are only effective if signed by Brian Burk or Ralph Burk. (R-901; R-1050 at 1062, ll. 1-19).

8. Traco's own proposed change order forms bear the language, "This change order must be signed and returned immediately to Traco thus verifying that we have authorization to proceed." (R-901). See, e.g., P. Ex. 28.

U.S. Army Reserve Project

9. On October 28, 1998, Comtrol and Traco entered into a Subcontract Agreement for steel erection at the U.S. Army Reserve Center located at 5500 West 700 South, Salt Lake City. (R-190-94). The contract amount was initially $42,100. (R-190 at ¶ 8).

10. The Subcontract Agreement was subsequently revised by the following approved change orders to $64,218.90:

3605	Beams & Columns	$2,070.00
3626	Furnish Crane	$3,900.00
3816	Back charges McQueen damage	-$ 255.18
3908	Weld & install brick lintel	$350.00
4036	Revise TC	$850.00
4037	Increase in wage rate	$12,994.08
4061	Steel framing duct work	$2,000.00
4251	T&M Backcharge	$210.00

(R-196-203).

11. The Subcontract Agreement provided that Traco was to supply a crane for the entire job. However, due to delays in portions of the job being ready, Traco only rented a crane from a rental agency for 1-3 days and then returned the rented crane. Deposition of

Tracy Bronson, R-206, at 22, ll. 17 - 23. For the remainder of the job, Traco used Comtrol's crane and Comtrol's operator. Id. (R-206 at 24, ll. 17 - 29).

12. While Traco believed that it should have been paid more for having to wait for different parts of the job to become ready, it did not submit any such requests for payment to Comtrol. (R-207 at 36, l. 18 - 37, l. 4). Nor did Traco make any request for additional time. Id. at 37, ll. 16 - 21. Instead, Traco failed to return to the job to finish the work for which it had contracted. (R-208 at 41, l. 14 - 42, l. 16).

13. On November 7, 2000, Comtrol issued Change Order 4258 (R-212), back charging Traco for $13,345.00 for crane usage and additional work Comtrol had to perform to complete Traco's obligations under the Subcontract Agreement. Change Order 4258 was mailed to Traco on November 9, 2000. (R-213, R-252; Affidavit of Sharon Zobell at ¶ 6).

14. In response to Change Order 4258, Traco admitted that some of its work had been performed by Comtrol, but disputed the back charge amounts in Change Order 4258 and never signed it. (R-209 at 49-50).

15. However, on November 28, 2000, Tracy Bronson of Traco signed Change Order 4263, which revised the Contract total to $50,023.90. (R-240). That Change Order further stated,

> It is understood and agreed that the acceptance of this contract modification by the subcontractor constitutes an accord and satisfaction, and represents the final adjustment of any and all costs, delays, time extensions or other equitable adjustment, if any, arising out of, or incidental to, the work herein revised. NOTE: This Change Order becomes part of and in conformance with the existing contract.

Id.

16. At his deposition on February 10, 2005, Tracy Bronson testified that he understood that Change Order 4263 revised the contract amount to $50,023.90. (R-210 at 57, ll, 1 - 6).

17. For Traco's work on the U.S. Army Reserve Project, Comtrol paid Traco $59,201.95 in seven payments, as follows:

Payments	
Chk 36782 7/2/99	10,111.50
Chk 37056 8/20/99	13,500.00
Chk 37457 10/27/99	9,000.00
Chk 37768 12/17/99	9,000.00
Chk 38055 2/1/00	12,994.08
Chk 38229 2/28/00	3,495.37
Chk 38379 3/24/00	1,101.00
TOTAL	$59,201.95

(R-242-255, copies of checks; R-262, Affidavit of Sharon Zobell at ¶ 8).

18. Comtrol sought summary judgment with respect to the U.S. Army Reserve Project contending, inter alia, that Change Order 4263 was a valid accord and satisfaction. (R-183).

19. In opposing Comtrol's Motion for Summary Judgment, Traco submitted an affidavit from Tracy Bronson (R-282-89) stating that he had made a mistake in signing Change Order 4263, in that he had not noticed the revised contract amount set forth on the face of the document. (R-287 at ¶ 14).

20. Comtrol moved to strike the affidavit, pointing out that it contradicted Mr. Bronson's deposition testimony on February 10, 2005, as to his understanding of the effect of the Change Order without explaining the discrepancy. (R-539; R-473-74).

21. Comtrol also argued, in submitting a Reply Memorandum in support of its Motion for Summary Judgment, that even if Mr. Bronson's Affidavit were considered by the Court, it did not meet the legal standard for unilateral mistake, and was not therefore sufficient to defeat the Motion for Summary Judgment. (R-476-78).

22. Traco responded to Comtrol's Motion to Strike by stating that not only had Mr. Bronson been mistaken in signing the Change Order, he had also made a mistake in testifying at his deposition. (R-604). To correct the second "mistake," Traco submitted an untimely deposition correction. (R-606).

23. In granting Comtrol's Motion for Summary Judgment, the Trial Court ruled that Change Order 4263 was a valid accord and satisfaction, entitling Comtrol to summary judgment for the $9,178.05 amount it had overpaid Traco on the U.S. Army Reserve project. (R-1056 at 2). While it did not rule on the Motion to Strike, the Trial Court found that Traco had not created an issue of fact on the issue of unilateral mistake. (R-1056 at 2).

UVSC Project

24. On May 24, 2000, Comtrol and Traco entered into a Subcontract Agreement for the steel erection on the UVSC Student Center Expansion located in Orem for the price of $111,000.00. (D. Ex. 51).

25. The Contract amount was reduced to $108,406.22 by approved change orders and Owner Controlled Insurance Program ("OCIP") adjustments in the following amounts:

CO 4175	Install beam	$1,500	(P. Ex. 85)
CO 4343	Add guard rail	$300	(D. Ex. 55)
CO 4514	Weld angle joint	$175	(P. Ex. 91)
CO 4481	Initial OCIP deduct	$-5,407.00	(D. Ex. 58)

CO 5465	Final OCIP adjust	$838.22	(D. Ex. 52)
Total		-$2,593.78	

R-901 at ¶ 10; D. Ex. 78 at COM 0213.

26. Over the course of this project, Comtrol made the following payments to Traco:

8/16/2000	Check 39397	$5,700.00
11/9/2000	Check 40044	$1,425.00
5/9/2001	Check 41255	$27,265.00
6/4/2001	Check 41375	$56,923.05
8/6/2001	Check 41803	$6,175.00
Total		$97,488.05

(R-901 at ¶ 11; D. Ex. 78 at COM 0212).

27. The Trial Court considered the amounts that had been contractually agreed to by the parties for the UVSC project, and the amounts paid to Traco by Comtrol for that project, finding a balance on the contract of $10,918.17. (R-902 at ¶ 12).

28. In addition to the approved Change Orders, which revised and reduced the Subcontractor Agreement amount to $108,406.22, Comtrol issued additional back charges against Traco, relating to work within Traco's scope of work that Comtrol had to perform because Traco either did not provide an adequate work force, or asked to use Comtrol's crane or forklift to unload steel that had arrived at the job site, or refused to perform the work. These back charges totalled $20,748.17 and were calculated as follows:

No. 4268	Deduct to Unload Steel	-$415.00	(D. Ex. 55)
No. 4569	Deduct for hoisting	-$1,957.50	(D. Ex. 65)
No. 4700	Deduct for hoisting/materials	-$1,095.94	(D. Ex. 67)
	Back charges to Complete Traco's Work	-$17,279.73	(D. Ex. 74)
Total		-$20,748.17	

(R-902 at ¶ 902;D. Ex. 78 at COM 0213).

29. The work on this Project required tight coordination with the other subcontractors inasmuch as there was a very limited staging area and the work was to be performed in four discrete stages, requiring Traco to break up the timing of its work. See, Attachment A to D. Ex. 51.

30. During the course of the Project, Traco personnel did not attend weekly meetings held to coordinate the timing of the work among subcontractors. See, D. Ex. 76. Traco's absence from these meeting seriously impacted coordination among the subcontractors (and in particular with respect to the coordination of steel deliveries by Dwamco). (R-1050 at 1074, l. 13 - 1076, l. 20; R-903).

31. Traco performed its first portion of the work, Phase I, in June and July of 2000. During this period, on two occasions, July 18 and July 28, 2000, Traco asked for permission to use Comtrol's crane and forklift to unload steel. Mr. Eugene Cook, Comtrol's superintendent, noted potential backcharges on the timecards of employees who helped in unloading the steel, or on the daily reports, and change order 4268 was prepared and issued using those notations. (R-1050 at 1082-83; D. Ex. 54).

32. By January of 2001, Traco began its work on the other phases of the Project. On April 4, 2001, Comtrol advised Traco that it was behind schedule and was impacting other trades. (D. Ex. 57). Traco had been using a two-to-four-man crew over the prior three weeks which was insufficient to maintain adequate progress. Id. The Comtrol letter reminded Traco of the Liquidated Damages the Owner would impose on Comtrol if the project was not completed timely. Comtrol directed Traco to return to work immediately and

regain the lost time. Id. Traco was directed in writing to explain by April 5, 2001, the actions Traco would take to regain the lost time. Id. Traco failed to provide this information to Comtrol. (R-1049 at 878).

33. On April 24, 2001, Comtrol's Superintendent Eugene Cook called Traco to complain that Traco had only one person on site. The other subcontractors on the Project had complained that Traco was holding them up. Mr. Cook was told by Traco's foreman that Tracy Bronson was having a personal problem but would be at the job site later that day. Mr. Bronson never arrived. Mr. Cook was not successful in speaking with Mr. Bronson, but left a telephone message. (D. Ex. 77).

34. On May 30, 2001, Traco executed a Subcontractor Lien Waiver that waived and released Traco's right to any claims for labor and materials provided to the UVSC project on or before April 30, 2001. (D. Ex. 63). This release was in exchange for Comtrol's payment of $56,923.05 to Traco, which payment was made by Comtrol via Check No. 41375, thus rendering the release fully effective. (D. Ex. 78).

35. Throughout 2001, Traco continued to use Comtrol's crane and forklift to unload steel. In one case, this was done without Comtrol's permission, as Traco came to the job site on a Sunday, May 6, 2001, when Comtrol was not on the job. Mr. Cook continued to note Traco's use of Comtrol's forklift and crane on time cards/and or daily reports, and Change Orders 4569 (D. Ex. 65) and 4700 (D. Ex. 67) resulted.

36. With the exception of railings and punch list items, which was part of Traco's subcontract, Traco's work had been completed by the end of September, 2001. In early

January of 2002, Comtrol advised Traco orally that the hand railing materials had been delivered to the job site and that Traco should return to install the railing per Traco's Subcontractor Agreement (D. Ex. 69). Traco refused to do so. (D. Ex. 69, R-1049 at 900, l. 20 - 902, l. 7).

37. On January 3, 2002, Comtrol gave Traco a written 48-hour notice to report to the Project, initiate work and perform diligently. Comtrol advised Traco that if it did not return, Comtrol would have the work performed by others and back charge Traco. (D. Ex. 69). Traco responded that it would not return until it was paid "all outstanding Contract Draws and Change Orders." Traco further demanded that the railing work be made a change order. (D. Ex. 70). Traco did not make a request for additional time. However, the Subcontractor Agreement between Traco and Comtrol provided that in the event of a dispute as to the scope of work, Traco was to still "promptly follow the written orders" of Comtrol and the "dispute will be settled later." (D. Ex. 51 at Paragraph 28).

38. The Subcontractor Agreement also provided, "Subcontractor will not interrupt or delay its work because of any dispute with Contractor, but will continue to perform its subcontract work diligently to completion, and will later negotiate in good faith for settlement of the dispute. (D. Ex. 51 at Paragraph 29). Traco refused to return and abandoned the job. (R-1049 at 900, l. 20 - 902, l. 7).

39. Thereafter Comtrol and a subcontractor, Gorden Johansen, performed the hand railing work, as well as the other uncompleted Traco work. Comtrol attempted to mitigate its damages by hiring Mr. Johansen, a skilled welder, instead of hiring another steel erection

company. (R-1049 at 957, ll. 19-25). To complete the work, Comtrol backcharged Traco $17,279.73. (D. Ex. 74).

40. The hourly rate of $50.68 charged by Comtrol in calculating its backcharge was based, in part, on a publication entitled "R.S. Means Building Construction Cost Data, 2001, Western Edition." (D. Ex. 79; R-1049 at 959, ll. 15-21). Comtrol uses this publication for estimating purposes in bidding jobs, and has used it for this purpose on several hundred projects. (R-1049 at 959, ll. 22-25; R-1049 at 960, ll. 17-20). The rates set forth in R.S. Means are consistent with Utah market rates for steel workers. (R-1049 at 960, l. 21 - 961, l. 4).

41. Notwithstanding the foregoing, the Trial Court concluded that Comtrol's backcharges were excessive, and reduced the completion backcharge to $8,900.00, finding that to be the reasonable market value of the work performed by Comtrol to complete the project. (R-905-06). Weighing all backcharges against the outstanding contract balance due to Traco, the Trial Court found that Traco owed Comtrol $1,450.27. (R-906 at ¶ 25).

42. However, Traco asserted a number of back charges and/or change orders against Comtrol which Traco claimed should be factored into the final contract analysis for this Project, totaling $19,753.25, maintaining that its claims arose from fabrication errors made by Dwamco, the fabricator, which Traco allegedly repaired. (P. Ex. 2).

43. Traco brought these errors to the attention of Comtrol and Dwamco, and then made arrangements with Dwamco to correct the errors. Thereafter, Traco and Dwamco reached agreements on the issues of whether Traco or Dwamco would be making the repairs,

and the price that Dwamco would pay to Traco when Traco did make the repairs. (R-1050 at 1063, l. 18 - 1064, l. 5). Comtrol was not a party to these agreements, or involved in the negotiations that gave rise to them. Indeed, Comtrol's superintendent on the project, Eugene Cook, testified that he had not been involved at all in the negotiations between Traco and the other subcontractors with respect to the price of Traco's repairs. (R-1050 at 1063, l. 18 - 1064, l. 13).

44. When Traco sought to invoice Comtrol for this work, Comtrol consistently advised Traco that it should look to Dwamco for recovery. (P. Ex. 114). In fact, Traco invoiced Dwamco for much of this work, (P. Ex. 108), and sued Dwamco, seeking recovery for that work in the proceedings below. (R-5, Traco's Fourth Cause of Action; P. Ex. 2 (captioned "Traco Steel Claim for Damages Against Comtrol, Inc. and/or Dwamco, Inc.")).

45. The Trial Court held that Traco's proposed change orders were deeply flawed. None of them were approved by Comtrol before Traco abandoned the job. The change orders did not bear the signature of either Ralph Burk or Brian Burk, as was required by the Subcontractor Agreement at paragraph 26. One of Traco's proposed Change Orders, No. 5 (P. Ex. 78), bears the signature of Eugene Cook, who testified that when he signed, he was only verifying the hours worked, and not approving any change in the contract price. (R-906 at ¶ 27; R-1050 at 1067, l. 19 - 1068, l. 3).

46. The Trial Court found that these Dwamco-related change orders failed to demonstrate any meeting of the minds between Comtrol and Traco on the integral elements

of an agreement, including price or a method for determining price, rendering the proposed change orders too indefinite and uncertain for enforcement. (R-907 at ¶ 29).

47. The Trial Court also found that seven of the UVSC change orders submitted by Traco, totaling $10,355.25, sought recovery for work that was waived by Traco in its May 30, 2001 Lien Release, in that the work was performed prior to April 30, 2001, the effective day of the Release. (See, D. Ex. 63). These include:

Proposed Change Order	Date of Work	Amount Sought
DWAMCO CO 1	April 22, 2001	$ 3,592.00
DWAMCO CO 2	April 2-5, 2001	$ 672.00
DWAMCO CO 3	April 10, 2001	$ 3,582.16
DWAMCO CO 4	Before April 25, 2001	$ 1,008.00
DWAMCO CO 5	March 30, 2001	$ 476.09
Second CO 1 - Beam D-13	March 6, 2001	$ 225.00
Job Instruction Re Mechanical Opening	April 24, 2001	$ 800.00
	TOTAL	**$10,355.25**

(R-907-08 at ¶ 30, P. Ex. 2).

48. Paragraph 26 of the Subcontractor Agreement provides that "Contractor shall not be obligated to Subcontractor for any amount greater than Contractor receives from the Owner for the change. The Trial Court found that Traco's failure to submit its proposed change orders timely prevented Comtrol from seeking approval from the Owner. Comtrol did not receive any increased change order amount from the Owner of the UVSC which Comtrol has not paid to Traco. (R-909 at ¶ 34).

Weber State Visual Art Center

49. On July 14, 2000, Comtrol and Traco entered into a third Subcontractor Agreement for the steel erection on the Weber State Visual Art Center for $270,000.00. (D. Ex. 51). The Contract amount was reduced by change orders and OCIP deductions to $254,658.24 as follows:

Original Contract	$270,000	
4424 Initial OCIP deduct	-$13,521.00	(P. Ex. 7)
4456 ½ Cost of Wagstaff crane	-$442.50	(P. Ex. 9)
4545 Additional welding & erection	$795.00	(P. Ex. 5)
4548 Additional erection	$875.00	(P. Ex. 6)
4666 Additional roof frame	$100.00	(P. Ex. 8)
4673 Fix grids E & 4	$0.00	
4714 Additional costs for ASI #23	$500.00	(P. Ex. 10)
5513 Final OCIP deduct	-$3,648.26	(P. Ex. 35)
TOTAL Change Orders	-$15,341.76	
Revised Contract Amount		$254,658.24

(R-909 at ¶ 35).

50. Over the course of the project, Comtrol paid Traco $252,977.85, broken down by individual check number as follows:

Chk 41058 4/10/01	$35,972.00
Chk 41339 5/30/01	$45,066.00
Chk 41533 6/25/01	$44,931.00
Chk 41739 7/26/01	$45,066.00
Chk 42111 9/20/01	$23,888.85
Chk 42279 10/12/01	$18,054.00
Chk 42432 11/2/01	$30,000.00
Chk 42899 12/28/01	$10,000.00
TOTAL	$252,977.85

(P. Ex. 21).

51. Thus, considering only the amounts that had been contractually agreed to by the parties for the Art Center Project, and the amounts paid to Traco by Comtrol, the balance on the contract was $1,680.39. (R-910 at ¶ 36).

52. As was the case with the UVSC project, the Art Center also had a small staging area and required coordination among the subcontractors. (R-910; R-1048 at 637, l. 22 - 638, l. 8).

53. Traco failed to inventory the steel components delivered to the job site by the fabricator Gos. (R-1048 at 666, l. 10 - 667, l. 15).

54. Early in the course of the Contract, Traco again fell behind in performing its work. (D. Ex. 2). Traco blamed Comtrol for steel components which it believed had not been delivered to the job site. (P. Ex. 11).

55. Without Comtrol's permission, Traco removed steel from the job to use on an unrelated project Traco was performing for another General Contractor involving the skybox at the Weber State football field. (R-1048 at 674-79). On one occasion, Burt Merrill discovered Traco loading a trailer full of steel that was already on site and preparing to hook it up to a truck. (R-1048 at 678, ll. 10-25). Mr. Merrill told Traco he would call the police if they drove the trailer off the job sight, whereupon Traco unhooked the trailer. (R-679, ll. 3 -7).

56. Traco also failed to attend weekly job site meetings on the Weber State Project where Comtrol coordinated the work of all of the subcontractors. While Comtrol's Project Manager faxed the minutes of the weekly meetings and punch lists to Traco (R-1047, ll 3 -

8), Traco's absence from these meeting seriously impacted coordination among the subcontractors. (D. Ex. 26; R-1047 at 329, l. 14 - 330, l. 330).

57. Traco continued to blame Gos' and informed Comtrol by letter, dated January 4, 2002, that if all steel for the project was not on site by 4:00 p.m that day, it would become Gos' responsibility to install that steel. (P. Ex. 14). Comtrol responded that there were other steel components which were on the job site which Traco could erect while waiting for the missing parts to arrive. (R-1048 at 681, ll. 6 - 14; D. Ex. 21). Moreover, some of the missing parts could not be fabricated until later inasmuch as such parts were dependant upon field measurements which could not be taken until other portions of the Project were first completed. (R-1048 at 682, l. 15 - 683, l. 5).

58. Starting in January 2002, Comtrol was forced to take over the performance of Traco's work. On January 4, 2002, Comtrol received written notice from Traco that it was abandoning the job. (P. Ex. 14). Whereupon, Comtrol notified Traco in writing that under Section 31 of the Subcontract Agreement, Comtrol would perform the Traco work and would look to Traco for the costs in completing Traco's contract (D. Ex. 21). .

59. Comtrol's Project Manager and Superintendent both made numerous calls to Traco, directing Traco to return to the job site to perform its obligations and mitigate its damages. Traco refused to do so. (R-1048 at 680, ll. 2-16; R-1048 at 688, ll. 2-27). Traco did, however, return to the job site on occasion to take pictures. (P. Exs. 183, 184, 186 and 187; R-1050 at 1146 , ll. 4 - 8). On one such occasion Traco was invited to attend a

subcontractor's meeting, but did not do so. (R-1047 at 501, ll. 4 -6). In the course of completing Traco's work, Comtrol incurred $58,212.50 in expenses. (D. Ex. 38).

60. On October 17, 2001, Traco executed a Subcontractor Lien Waiver that waived and released Traco's rights to any claims for labor and materials provided to the Weber State Project on or before August 31, 2001. (D. Ex. 12). This Lien Release was in exchange for Comtrol's payment of $18,054.00, which payment was made by Comtrol via Check No. 42279, rendering the Release effective. (P. Ex. 21).

61. Ten of Traco's proposed Weber State change orders, totaling $17,780.00, sought recovery for work that was waived by Traco's October 17, 2001 Release (D. Ex. 12), in that the work was performed on or before August 31, 2001, the effective date of the Release. These included:

Description	Date of Work	Amount Sought
Beam B-51	Before 7/29/01	$ 112.00
Beam C-22	Before 7/29/01	$ 280.00
Beam A-22	Before 7/29/01	$ 280.00
Beam B-8	Before 7/29/01	$ 112.00
Lower Beams for Recess at E-10 and at A-51	Before 7/29/01	$ 1,052.00
Columns K-39 and M-39	Before 7/29/01	$ 2,206.00
Beam B-51	Before 7/29/01	$ 1,792.00
Arch Tube A70	Before 7/29/01	$ 1,120.00
CO 11	8/25 to 8/31/01	$ 8,740.00
CO 8	6/27 to 7/2/01	$ 2,086.00
	TOTAL	**$17,780.00**

(P. Ex. 1; R-916 at ¶ 63).

62. Burt Merrill testified that many of the Weber State Change Orders which purported to bear his signature were, in fact, forgeries. (R-1048 at 643, ll. 13 - 24).

SUMMARY OF ARGUMENTS

Traco's appeal of the Trial Court's findings required that Traco marshal the evidence supporting the Trial Court's findings pursuant to Rule 24(a)(9). Traco has challenged a number of the Trial Court's factual findings, including (a) damages awarded to Comtrol arising out of Traco's failure to complete its contractual obligations; (b) the Trial Court's determination that Traco should not be allowed to was not entitled to recovery of additional monies for unsigned change orders; © the Trial Court's determination that certain lien releases executed by Traco waived claims for all work performed before the effective dates of the releases;(d) the Trial Court's determination that the facts did not support a finding that Comtrol agreed to pay Traco for correcting alleged errors by a steel fabricator, Dwamco; and (e) the Trial Court's determination that the facts did not support the application of the doctrine of anticipatory breach to reduce the damages awarded to Comtrol. On appeal, Traco has completely failed to make any effort to marshal the evidence supporting these determinations, as is required by UTAH R. APP. P. 24(a)(9).

The Trial Court correctly granted Comtrol summary judgment on the U.S. Army project. In exchange for Comtrol performing a portion of Traco's work, Traco's president, Tracy Bronson, signed an unambiguous change order which was an accord and satisfaction, setting forth a revised contract amount. Traco attempted to defeat summary judgment by claiming that Mr. Bronson had mistakenly overlooked the revised contract amount. The Trial

Court correctly held that this assertion was not sufficient to show unilateral mistake and create an issue of fact.

The Trial Court correctly assessed Comtrol's damages incurred in completing Traco's work. Comtrol based its damages evidence, in part, on a well-known construction industry estimating guide, R.S. Means, and supported its claims with time cards and daily reports showing the work performed. Traco had the opportunity to critique Comtrol's damages, claiming that certain charges were excessive. The Trial Court weighed the evidence, and made significant reductions to Comtrol's damages. Because the Trial Court was in the best position to weight the evidence, and because there was no dispute that Comtrol completed Traco's work, the damage award should not be overturned.

Traco seeks to reverse the Trial Court's ruling that it could not collect for certain change orders involving work performed by Traco to correct alleged fabrication errors by the UVSC steel fabricator, Dwamco. The Trial Court correctly ruled that the subcontract, which warns subcontractors against proceeding to do change order work without written approval by Comtrol, barred those claims. Comtrol never agreed to pay Traco for this work, either verbally, or in writing.

The Trial Court was also correct in enforcing unambiguous lien releases, which purported to release any claims for labor or materials provided before a date certain. Traco claimed that these releases did not bar claims for change order work performed before the release date. Because the releases were unambiguous, the Trial Court correctly rejected Traco's interpretation.

Finally, because the Trial Court's rulings were correct, there is no need to overturn the attorneys' fees award to Comtrol.

ARGUMENT

I. TRACO'S APPEAL SHOULD BE DENIED FOR FAILURE TO MARSHALL.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires "[a] party challenging a fact finding [to] first marshal all record evidence that supports the challenged finding." To fulfill its duty to marshall, Traco was required to,

> "temporarily remove [their] own prejudices and fully embrace the adversary's position"; [they] must play the "devil's advocate." In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case . . . . In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence.

United Park City Mines v. Stichting Mayflower Mountain Fonds, et al., 2006 UT 35, 140 P.3d 1200 (2006). Instead of marshalling, Traco has merely re-argued on appeal the factual case, leaving Comtrol and this Court "to bear the expense and time of performing the critical task of marshalling the evidence. This is unfair, inefficient, and unacceptable." Id. at 1207, ¶26. The Utah Supreme Court has consistently warned of the "grim consequences parties face when they fail to fulfill the marshalling requirement," and that the appellate court "can rely on that failure to affirm the lower court's findings of fact." Id. at 1207, ¶ 27. As such, "[a]n appellant may not simply cite to the evidence which supports his or her position and hope to prevail." Wayment v. Howard, 144 P.3d 1147, 1150 (Utah 2006)

Put differently,

> In order to properly discharge the duty of marshaling the evidence, the challenger must present, in ***comprehensive and fastidious order, every scrap of competent evidence*** introduced at trial which supports the very findings the appellant resists. After constructing this ***magnificent array of supporting evidence***, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Because Traco's brief is bereft of even the slightest attempt at marshalling, this Court should affirm all of the Trial Court's findings of fact.[3]

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO COMTROL ON THE ARMY RESERVE CONTRACT.

A. The Trial Court Correctly Ruled that Change Order 4263 was a Valid Accord and Satisfaction.

The contractual amount due Traco for its work on the U.S. Army project was clearly established by contract documents agreed to by Traco. The initial contract amount was $42,100. Via change orders and back charges, the contract amount was subsequently revised to $50,023.90. That final amount was contractually agreed to by Traco when it signed Change Order 4263. Change Order 4263 clearly set forth a revised contract total of $50,023.90. It also contained language expressly informing Traco that "acceptance of this contract modification by the subcontractor constitutes an accord and satisfaction, and represents the **final adjustment of any and all costs, delays, time extensions or other**

[3]Comtrol will set forth the facts supporting the Trial Court's various findings in the relevant subsections of this brief.

equitable adjustment, if any, arising out of, or incident to, the work herein revised." R-240. (Emphasis added).

Change Order 4263, signed by Traco on November 28, 2000, was the final contract document. It was signed by Traco after Comtrol's November 7, 2000 issuance of Change Order 4258, a $13,345.00 back charge. At his deposition, Tracy Bronson testified with unmistakable clarity that he understood that Change Order 4263 revised the contract amount to $50,023.90. (R-210, Bronson Depo., at 57, ll. 1 - 6). Consequently, Comtrol was entitled to summary judgment on the U.S. Army Reserve Center Contract on the theory that Change Order 4263 was a valid accord & satisfaction.

It is a well accepted principal of construction contract law that a change order containing accord and satisfaction language as strong as the language at issue here constitutes a valid accord and satisfaction. See, e.g., Safeco Credit v. U.S., 44 Fed. Cl. 406, 418-21 (Fed. Cl.1999); King Fisher Marine Serv., Inc. v. U.S., 16 Cl. Ct. 231, 237 (Cl. Ct. 1989); Huber, Hunt & Nichols, Inc. v. Moore, 136 Cal.Rptr. 603, 618 (Cal. Ct. App.1977) (stating that party signing a change order had "no right to accept the Change Order, sign the accord and satisfaction clause, and then claim additional cost").

In Safeco Credit, the court was faced with a change order containing language strikingly similar to the language contained in Change Order 4263:

> Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect, and/or delays arising out of, or incidental to, the work as herein revised and the extension of the contract completion time.

44 Fed. Cl. at 419. While Safeco insisted that it had not intended for its signing of the change order to have the legal consequences set forth in the accord and satisfaction provision, the court held that, as a matter of law, such an allegation was insufficient to raise a genuine issue of material fact so as to preclude summary judgment for the government. Id. at 420.

In S & G Inc. v. Intermountain Power Agency, 913 P.2d 735, 738-39 (Utah 1996), the Utah Supreme Court detailed the requirements for an accord and satisfaction. Those elements are (1) a bona fide dispute over an unliquidated amount, (2) a payment made in full settlement of the entire dispute, and (3) an acceptance of the payment.

The first element requires two findings: (1) that the dispute is bona fide and (2) that the dispute involves an unliquidated amount. The bona fide dispute element requires "a good-faith disagreement over the amount due under the contract." Estate Landscape v. Mountain States, 844 P.2d 322, 326 (Utah 1992). For a valid accord and satisfaction, a "disagreement need not be well founded, so long as it is in good faith." Id. In this case, the differing interpretations of the proper amount of the back charge in Change Order 4258 constituted a bona fide dispute. Comtrol asserted that Traco owed it $13,345.00 for crane usage and additional work Comtrol had to perform to complete Traco's obligations under the Subcontract Agreement. Traco agreed that some of its work was performed by Comtrol, but disputed the amounts in change Order 4258 and never signed it. (Bronson Depo, pgs. 49 - 50). Each party asserted a differing interpretation of their contract rights as applied to the facts, and Traco presented the Trial Court with no evidence that Comtrol maintained its

position in bad faith. Given this bona fide dispute, the only conclusion possible on these facts was that Traco had agreed, by signing Change Order No. 4263, to settlement of all its claims for the Army Reserve project for the total of $50,023.90, and the Trial Court was correct in so ruling.

With respect to the second two elements for a valid accord and satisfaction, the checks paid to Traco by Comtrol for the project total $59,201.00. There was simply no evidence indicating that Traco did not accept these payments. Consequently, not only did Traco fail on its claim that it was owed any money on the U.S. Army project, but, in addition, it has been overpaid in the amount of $9,178.05.

Traco argues that Change Order 4263 cannot be a valid accord and satisfaction or contract modification due to the timing of Comtrol's payments to Traco, noting that the last check which Traco received for the U.S. Army project predated Change Order 4263. This fact, argues Traco, precludes a finding that the change order was supported by consideration. This analysis misconstrues both the law concerning accord and satisfaction, and the consideration bargained for in Change Order 4263.

"Generally the elements of a contract must be present in an accord and satisfaction, including proper subject matter, offer and acceptance, competent parties, and consideration." Neiderhauser Builders and Dev. Corp. v. Campbell, 824 P.2d 1193, 1197-98 (Utah Ct. App. 1992). On its face, Change Order 4263 sets forth an exchange of consideration between Traco and Comtrol. Traco received consideration because it was excused from having to perform a portion of its contract that Comtrol had performed instead. The Change Order set

forth this fact, and offered to resolve the parties' contractual responsibilities by reducing the contract price by $850 to $50,023.90. Given Comtrol's previous payments totaling $59,201.95, inherent in the Change Order was a promise on Traco's behalf to repay the $9,178.05 in excess of the revised contract amount. Traco's argument that the Change Order failed for lack of consideration was therefore misplaced as a matter of law, and the Trial Court properly rejected it.

B. Mr. Bronson's Sham Affidavit was Inappropriate in the Summary Judgment Context.

"The general rule is that in a summary judgment proceeding, 'when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy.'" Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 71 (Utah 1998); see also, Uintah Basin Med. Ctr. v. Hardy, 110 P.3d 168, 173, 2005 UT App 92, ¶ 14 (Utah Ct. App. 2005) (same).

Here, in an attempt to create a disputed material fact where none existed, Traco submitted a sham affidavit in which Mr. Bronson claimed, at paragraph 14 of his Affidavit, that he made a mistake in signing Change Order 4263. This was in clear contradiction of his deposition testimony. Mr. Bronson's testimony as to his understanding of the effect of Change order 4263 is clear:

> Q. (By Mr. Butler) I am showing you Exhibit 56. Change order 4263 reverses $850. Is that your signature?
> A. Yes, it is.
> Q. You don't dispute this deduction, do you, in the form of a change order?
> A. No.

Q. And that your revised contract is $50,023.90, correct?
A. Correct.

Bronson Depo. at 56, l. 22 - 57, l. 6. Mr. Bronson clearly understood when he signed Change Order 4263 that the result was a revised contract amount of $50,023.90.

Traco did not attempt to explain the discrepancy, but instead responded to Comtrol's Motion to Strike by stating that not only had Mr. Bronson been mistaken in signing the Change Order, he had also made a mistake in testifying at his deposition. (R-604). To correct the second "mistake," Traco submitted an untimely deposition correction. (R-606).

Paragraph 14 of Mr. Bronson's Affidavit was improper in the summary judgment context and should have been stricken. Traco's failure, in its opening brief in this appeal, to even mention Comtrol's attempts to have the Affidavit stricken, coupled with its insistence that the Affidavit created an issue of material fact, are troubling, at best.

C. Traco Failed to Prove Unilateral Mistake with Respect to Change Order 4263.

Rather than strike Mr. Bronson's Affidavit, the Trial Court considered its legal significance. Traco asserted that it was entitled to rescission of Change Order 4263 due to a unilateral mistake it contended Mr. Bronson had made in signing that document.

In order to be entitled to such extraordinary relief, Traco was required to prove four elements:

> 1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.
> 2. The matter as to which the mistake was made must relate to a material feature of the contract.
> 3. Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.

> 4. It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in status quo.

B & A Assoc. v. L.A. Young Sons Const. Co., 796 P.2d 692, 695 (Utah1990).

Traco failed to meet these elements. With respect to the first element, each of the backcharges set forth in Change Order 4263 were contractually allowable backcharges, and Comtrol document the basis for each of them with time cards and daily reports setting forth the work performed by Comtrol. (R-212 -38). As such, there was nothing unconscionable about enforcing Change Order 4263.

With respect to element three, Traco failed to show that Mr. Bronson exercised ordinary diligence in signing the Change Order, if, as Traco alleges, he was not aware of the revised contract amount. The course of dealings between the parties foreclosed such a showing. Prior to being presented with Change Order 4263, Mr. Bronson had signed a number of change orders relating to this and other projects. Each of those change orders was on the same change order form, and contained a revised contract amount. Each contained the "accord and satisfaction" language contained in Change Order 4263. Ordinary diligence, then, would require Mr. Bronson, prior to signing Change Order 4263, to check the contract balance asserted therein against his understanding of the contract balance, and to then bring any discrepancies to the attention of Comtrol. He did not.

Utah jurisprudence on the meaning of "ordinary diligence" in the context of unilateral mistake mandated the Trial Court's conclusion that Mr. Bronson's conduct did not rise to that level. For example, in Maack v. Resource Design & Const., Inc., 875 P.2d 570, 574 (Utah

Ct. App. 1994), the Court of Appeals upheld a trial court entry of summary judgment against home buyers who had claimed they were entitled to a finding of unilateral mistake, and the resulting rescission of their home purchase contract. That contract had contained language stating that the home was sold "as is", without any warranty, and also contained an integration clause. The buyers claimed that the home was subject to a builder's warranty. It was undisputed that the buyers failed to ask for a copy of the builder's warranty and failed to condition their offer to purchase a home on the existence of the builder's warranty. Given these undisputed facts, the trial court's grant of summary judgment was appropriate. Id. at 577.

Similarly, in Klas v. Van Wagoner, 829 P.2d 135, 138-39 (Utah Ct. App. 1992), home buyers who alleged that they had made a unilateral mistake by offering $174,000 for a property without knowledge of a prior appraisal of the property at $165,000 were not entitled to rescission where they had failed to have the property appraised and thus not exercised ordinary diligence.

Mr. Bronson's level of diligence falls well below that of the parties that were held in the above-referenced cases to have been insufficiently diligent to justify rescission. Unlike those parties, Mr. Bronson was himself in possession of the information he needed in order to act with ordinary diligence; it was not in the hands of a third-party homebuilder or property appraiser. Given the holdings in those cases, Mr. Bronson, as a matter of law, failed to exercise ordinary diligence sufficient to support a finding of unilateral mistake and justify rescission of Change Order No. 4263. See also, Oliphant v. Estate of Brunetti, 64 P.3d 587

(Utah Ct. App. 2002) (finding lack of ordinary diligence where party signed an accord and satisfaction, because "the document is short and easy to understand.").The trial court correctly rejected Traco's unilateral mistake argument and granted Comtrol summary judgment on the U.S. Army Reserve project.

III. THE TRIAL COURT'S DAMAGE AWARD TO COMTROL SHOULD NOT BE DISTURBED.

In awarding Comtrol damages, the Trial Court made significant reductions in the backcharges Comtrol sought against Traco. The Trial court found, with respect to the UVSC backcharges, that the rates charged by Comtrol for laborers and welders exceeded standard reasonable rates, and that the hours claimed for completion and repair of the Kiln gate were excessive and unreasonable. (R-905-05 at ¶ 24). As such, the Trial Court reduced the UVSC backcharge from $17,279.73 to the "reasonable fair market amount" of $8,900. Id. With respect to the Weber State backcharge, the Trial Court found that the labor rates exceeded standard reasonable rates, some of the charges were duplicative, and some of the times cited to perform tasks were excessive. (R-912 at ¶ 45). Consequently, the Trial Court reduced the Weber State backcharge by $8,000. Notwithstanding the Trial Court's reduction in Comtrol's backcharges to Traco, Traco asserts that the court erred in awarding any damages to Comtrol.

A. Traco Failed to Marshall the Evidence Supporting the Trial Court's Damage Award.

As is stated above, Traco has failed at one of the most fundamental requirements of the appellate process, marshalling. Indeed, Traco has not even attempted to fulfill this requirement.

The record is replete with facts supporting the Trial Court's award of damages to Comtrol, including evidence regarding the reasonableness of the amounts Comtrol sought to backcharge Traco, including at least the following:

- The fact that Comtrol's subcontracts with Traco provided, in the last sentence of paragraph 26, that "Contractor shall not be obligated to Subcontractor for any amount greater than Contractor receives from the Owner for the change." (See, e.g., D. Ex. 1 at ¶ 26).
- The fact that Comtrol had to pay some of the costs of completing the projects with its own funds, and not with funds received from the owner. (R-1049 at 790, ll. 9 - 21).
- The fact that Comtrol attempted to mitigate the expense of completing Traco's work by hiring a skilled welder, Gorden Johansen. (R-1049 at 957, ll. 19 - 25).
- The fact that Comtrol attempted to keep the expenses and costs of completing Traco's work at a minimum because it believed that the odds of ever recovering anything from Traco were slim. (R-1049 at 958, ll.1 - 10).
- The fact that the R.S. Means rate Comtrol used as a starting point for calculating its damages is consistent with Utah market rates for structural steel workers. (R-1049 at 960, l. 21 - 961, l. 4).

- The fact that the R.S. Means rate accurately reflects the true cost to Comtrol of completing Traco's work. (R-1049 at 963, ll. 6 - 10).
- The fact that Comtrol's costs in completing Traco's work included costs for vehicles, insurance, fuel, a welder, consumables for the oxyacetylene torch, grinders, and grinding wheels. (R-1049 at 964, ll. 17 - 25).
- The fact that Comtrol's personnel who assisted with completion of Traco's work were, in many cases, working overtime to complete the projects on time. (R-1050 at 1009, ll. 23-25).
- The fact that most of the Comtrol employees who assisted with the completion of Traco's work were skilled workers, not the $10 per hour laborers Traco wishes had performed the work. (R-1050 at 1009, ll. 23-24.; R-1050 at 1012, 18 - 25).
- The fact that the rates Traco was charging on its change orders were as high as $59.51, exceeding Comtrol's hourly rate by almost $10.00. (P. Ex. 1, at various change orders; R-1050 at 1167, ll. 17 - 24). This indicates that Comtrol's rate is not above market.
- The fact that Traco likely could have completed the work for less expense than Comtrol, because it has expertise in steel erection. (R-1049 at 966, ll. 12 - 20).
- The fact that Comtrol made repeated efforts to get Traco to return to the job, and mitigate the backcharge expenses Comtrol was incurring. (R-1049 at 968, l. 24 - 969, l. 5).

B. Comtrol Presented Sufficient Evidence of its Damages to Sustain the Trial Court's Award.

I. Comtrol's Burden of Proof on Damages.

Before a trial court can award damages, a plaintiff must "'prove *the fact of damages* by evidence that gives 'rise to a reasonable probability that the plaintiff suffered damage . . . .'" Renegade Oil, Inc. v. Progressive Cas. Ins. Co., 101 P.3d 383, 386 (Utah Ct. App. 2004) (quoting Atkin Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 336 (Utah 1985)) (emphasis added). "The fact of damages must be proven by a reasonable certainty . . . ." Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986).

Damages are proven by a reasonable certainty when there is a "'sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered.'" Kilpatrick v.Wiley Rein & Fielding, 2001 UT 107, ¶76, 37 P.3d 1130, 1146 (quoting Cook Assoc., Inc. v. Warnick, 664 P.2d 1161, 1165 (Utah 1983) (internal quotations omitted)). This reasonable certainty requirement does not bar recovery if the uncertainty regards the amount of damages; rather the requirement "'is generally directed against uncertainty with respect to cause rather than to measure or extent [of damages]...." Terry v. Panek, 631 P.2d 896, 898 (Utah 1981) (quoting Gould v. Mtn. States Telephone & Telegraph Co., 309 P.2d 802, 805 (Utah 1952)). Thus, while "an award based on total lack of evidence cannot be sustained, the fact that the evidence upon which a court awards damages is sparse is no reason to deny all recovery for a wrong." Id.

When reviewing a trial court's judgment as to the fact of damages, reviewing courts "must" sustain the trial court's judgment "[i]f there is competent evidence to support the findings upon which the judgment is rendered[.]" Sawyers, 722 P.2d at 774.

In contrast, in Terry, the Utah Supreme Court held that a trial court erred as a matter of law when it concluded that the defendant's evidence was too uncertain and speculative to justify awarding *any* damages for their counterclaim, because any uncertainty as to defendant's evidence existed not as to "the causal connection between the wrong and the damage suffered," but only as to the *amount* of damages. 631 P.2d at 898. Because the fact that the defendant injured the plaintiff was not in doubt, the Court held that the plaintiff "'should not escape liability [solely] because the amount of [the defendant's counterclaim] cannot be proved with precision.'" Id. (quoting Winsness v. M. J. Conoco Distrib., 593 P.2d 1303, 1305–06 (Utah 1979)); see also, Shar's Cars v. Elder, 2004 UT App 258, ¶28, 97 P.3d 724, 731 (holding that a wrongdoer, "must assume some of the risk" that plaintiff's proof of damages will be imprecise).

ii. The Trial Court's scrutiny of Comtrol's Damage Evidence.

Because Comtrol submitted significant evidence supporting the Trial Court's damage award, this Court should uphold the Trial Court's Ruling. Comtrol prepared detailed damage exhibits for each project, including time cards and daily reports that showed all hours expended in completing Traco's work. Two Comtrol witnesses, Sharon Zobell and Brian Burk, spent significant time explaining how Comtrol's damages were calculated. (R-1049 at 788-96, Zobell testimony regarding Weber State damages; R-1049 at 801-10, Zobell testimony regarding UVSC damages; R-1049 at 958-66, Burk testimony re: use of R.S. Means and why rates set forth therein are an accurate approximation of Comtrol's costs to complete Traco's work). After weighing all testimony, including Traco's cross-examination

of Comtrol's witnesses, the Court reduced Comtrol's damages, finding that some of the time spent completing Traco's work was excessive, and the rates charged by Comtrol were high. The Trial Court reduced Comtrol's damages to what it considered a fair market rate. Because "a trial court is in the best position to determine what award of damages will make a plaintiff whole," Kilpatrick, 37 P.3d at 1145, this Court should not reverse the Trial Court's careful balancing of the evidence presented at trial on Comtrol's damages.

iii. Comtrol's use of R. S. Means Building Construction Cost Data, 2001, Western Edition was appropriate.

Traco takes issue with Comtrol's use of a respected construction estimation guide, R.S. Means, in calculating its damages.[4] Utah courts have endorsed the use of "industry-accepted methods" to calculate damages, so long as the court is presented with "sufficient evidence to enable the trier of fact to make a reasonable approximation." Kilpatrick, 37 P.3d at 1146 (holding that expert testimony on value of television station which used estimates based on published information of Salt lake television stations was not inadequate basis for award of damages).

Damage evidence based on R.S. Means has been accepted across the nation. See, e.g., ABT Building Products Corp v. Nat'l Union Fire Ins. Co. of Pittsburgh, 472 F.3d 99, 109, n. 13 (4th Cir. 2006) (discussing class-action settlement agreement that used R.S. Means to calculate costs of replacing damaged siding); Carlisle Corp v. Medical City Dallas, Ltd., 196

[4]While Traco asserts in its brief that the admission of R.S. Means (D. Ex. 79) was improper based on rules 602, 701 and 403 of the Utah Rules of Evidence (Appellant's Brief at 39), none of these objections were raised in the Trial Court. The only objection raised by Traco was one of foundation. (R-1050 at 1168, ll. 16-21).

S.W.3d 855 (Tex. Ct. App. 2006) (finding that an expert witness who based damage testimony on R.S. Means was qualified to testify); Nationwide Mut. Fire Ins. Co v. Tomlin, 352 S.E.2d 612, 616-17 (Ga. Ct. App. 1986) (finding that damages testimony based on R.S. Means was "more than sufficient to withstand any reasonable challenge as to damages being uncertain.").

The broad acceptance of R.S. Means, coupled with the testimony of Brian Burk that the R.S. Means rate accurately reflects the true cost to Comtrol of completing Traco's work, renders Comtrol's introduction of evidence based on R.S. Means proper. (R-1049 at 963, ll. 6 - 10).

iv. The Trial Court Properly Quashed Traco's Belated Subpoenas.

Having failed to conduct adequate discovery on Comtrol's damages, Traco served subpoenas for Comtrol's wage records in the middle of trial. The subpoenas were filed in violation of the Trial Court's Scheduling Order and Rule 16 of the Utah Rules of Civil Procedure. Rule 16(b) provides that the Court shall enter a Scheduling Order which limits the time to complete discovery. UTAH R. CIV. P. 16(b). In accordance with this rule, the deadline for completion of discovery in this case was established by Order of the Court and Stipulation of the Parties as February 1, 2005. (R-89). Traco blatantly disobeyed the Trial Court's Scheduling Order and Rule 16 by serving the subpoenas on February 8, 2006, more than one year after the discovery deadline had expired.

Under circumstances such as these, the Trial Court properly quashed the subpoenas. See, Scherer v. G.E. Capital Corp., 185 F.R.D. 351, 351-52 (D. Kan. 1999) (quashing

subpoena served by plaintiff upon defendant after discovery deadline because "in the absence of an extension of the [discovery] deadline, a party generally may not proceed with discovery over objection of the opposing party."); Leach v.Quality Health Servs., Inc., 162 F.R.D. 40, 42 (E.D. Penn. 1995) (granting motion to quash subpoena served only ten days after expiration of discovery deadline and awarding fees for costs incurred in bringing motion to quash).

C. The Trial Court Correctly Ruled that there was no Anticipatory Breach.

Traco argues that it was justified in abandoning both the UVSC and Weber State projects and refusing to complete its work because it perceived that Comtrol had anticipatorily breached its contracts with Traco by withholding payments for unapproved change orders. Traco further argues that this somehow justifies a reduction in the backcharges Comtrol has asserted against Traco. In light of the Trial Court's rulings that the Change Orders were defective, failure to pay them cannot be a basis for a finding of anticipatory breach by Comtrol.

A similar argument was rejected in Stewart v. C & C Excavating & Constr. Co., 877 F.2d 711 (8th Cir. 1989). There, a subcontractor argued that it was justified in abandoning a job in light of the contractor's failure to pay $2,385.78 due on a progress payment and refusal to pay for additional costs that the subcontractor asserted were the result of changes in the work. The subcontract explicitly provided that no addition or reduction of the contract price resulting from changes in the work would be binding on the general contractor unless agreed upon in writing by the parties or approved by the owner. Id. at 714. The court held

that the $2,385.78 was an insignificant portion of the total contract price and thus was not a "material breach" that would justify the subcontractor's nonperformance. Id.[5] Similarly, in light of the clear contract limitations on submission and approval of change orders, the general contractor's refusal to compensate the subcontractor for additional costs did not justify the subcontractor's abandonment of the subcontract. See, Stewart, 877 F.2d. at 714-15.

The facts compel similar results here. In early January 2002, when Traco refused to complete the UVSC project, the agreed-to contract amount had been reduced to $104,099.56. Def. Ex. 78. Comtrol had paid Traco checks totaling $97,488.05. Thus, Traco was arguably owed $6,611.51, or just over 6% of its contract. This amount can be reduced even further, in that the subcontract provided, at paragraph 8, for 5% retention, leaving just over $1,100, or 1% of the original contract price, in dispute. Instead, Traco demanded $28,534.38. P. Ex. 94. This amount clearly included unapproved change orders which had not been submitted in accordance with the provisions of the contract, and which Traco thus had no right to demand. Nor can it be said that Comtrol's failure to pay Traco for unapproved change orders "defeated the very object of the contract" or was "of such prime importance that the contract

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[5]See also, Aetna Cas. And Sur. Co. v. Aniero Concrete Co., Inc., 404 F.3d 566, 587-88 (2d Cir. 2005) (rejecting subcontractors claim for anticipatory breach based on failiure to make payments); Wagstaff v. Remco, Inc., 540 P.2d 931, 933 (Utah 1975) (stating that "a mere delay of a month by one party in making a payment on a contract would usually result in damages only, but would not justify the other party in abandoning the contract"); Integrated Inc. v. Alec Fergusson Elec. Contractors, 58 Cal.Rptr. 503, 509 (Cal. Ct. App. 1967) (stating that it is settled law that failure to make progress payments in building contracts is not the type of breach that justify's a subcontractor in abandoning the work).

would not have been made if default in that particular had been contemplated." Traco's decision to breach by abandoning the UVSC project was patently unreasonable and contractually unjustifiable. The Trial Court correctly found that Traco's abandonment was unjustified and did not support a reduction in the backcharges that were incurred in Comtrol's completion of Traco's work. (R-928-30).

With respect to the Weber State job, in January of 2002, when Traco made the decision to abandon the job and not complete its work, Comtrol had paid Traco $252,977.85, and the contract amount had been reduced to $258,306.50, leaving a balance of $5,328.65, or even less than the 5% retention Comtrol had a right to withhold. (P. Ex. 21). Given this balance, and the legal principals set forth above, (including the principal that failure to pay unapproved change orders that did not comply with the contract's change order submission requirements), the Trial Court was correct in finding that Traco failed to justify its abandonment of the Weber State project by claiming anticipatory breach and thereby reduce the amount which Comtrol has properly backcharged.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT TRACO COULD NOT RECOVER ON ITS CHANGE ORDERS RELATED TO DWAMCO.

A. Plaintiff Failed to Marshall the Facts Supporting the Trial Court's Finding that Traco was not entitled to Recover from Comtrol for Change Orders Related to Dwamco.

The following facts, completely absent from Traco's analysis and duty to marshal, support the Trial Court's finding:

- The fact that the subcontract requires that change orders be in writing and warns that a subcontractor who proceeds on verbal instructions does so at its own risk. (D. Ex. 51 at ¶ 26, and at Attachment A-1 at Paragraph 11).
- The fact that the subcontract limits the Comtrol personnel with authority to approve Change Orders to Brian Burk and Ralph Burk. (Ex. 51 at ¶ 26).
- The fact that Eugene Cook, Comtrol's superintendent, knew that he did not have authority to approve change orders and explained this to Traco every time he was approached with a proposed change order. (R-1050 at1062, ll. 1-19, and at 1063, ll. 6 -13).
- The fact that any costs for Dwamco change orders were arranged between Traco and Dwamco, without Comtrol's input. (R-1050 at 1063, ll. 23 - 1064, l. 8).
- The fact that, when Traco sought to invoice Comtrol for this work, Comtrol consistently advised Traco that it should look to Dwamco for recovery. (P. Ex. 114).
- The fact that Traco did invoice Dwamco for much of this work. (P. Ex. 108).
- The fact that Traco sued Dwamco, seeking recovery for this change order work in the proceedings below. (R-5, Traco's Fourth Cause of Action; P. Ex. 2, captioned "Traco Steel Claim for Damages Against Comtrol, Inc. and/or Dwamco, Inc.").
- The fact that the one proposed Change Order, No. 5 (P. Ex. 78), bears the signature of Eugene Cook, who testified that when he signed, he was only verifying the hours worked, and not approving any change in the contract price. (R-1050 at 1067, l. 19 - 1068, l. 3).

- The fact that no evidence was presented of any meeting of the minds between Comtrol and Traco on price or a method for determining price, rendering the proposed change orders too indefinite and uncertain for enforcement. (R-907 at ¶ 29).

B. The Trial Court Correctly Ruled that there was no Agreement Between Comtrol and Traco with Respect to the Dwamco Change Orders.

The Trial Court properly rejected Traco's misguided attempts to collect payment from Comtrol on work Traco performed at the request of Dwamco. The uncontroverted evidence at trial was that Mr. Cook had no authority to approve Change Orders, that this was set forth in the contract, that Traco was informed of this in writing, and orally by Mr. Cook, and that any discussions about the cost of Traco's work were between Traco and Dwamco, with no input from Comtrol.

Traco presented no evidence at trial to contradict Mr. Cook's or Comtrol's assertions that Comtrol was not a party to Traco's arrangements with Dwamco, and thus no proof that the amounts sought by Traco in its unapproved change orders were in any way approved by Comtrol. Where Comtrol was not a party to separate arrangements between Traco and Dwamco, the Trial Court was correct in not holding it responsible for payment of the obligations created by those arrangements.

Traco argues that the Trial Court's granting summary judgment to Dwamco on Dwamco's assertions that there was no contract between Traco and Dwamco mandates a finding that there was a contract between Comtrol and Traco for this work. However, no such conclusion is required. Instead, the logical extension of the Trial Court's rulings is that Traco failed to contract with either Dwamco or Comtrol. Traco's failure to protect itself is

not, however, a reason to hold Comtrol responsible.[6] The Trial Court correctly recognized that Comtrol had not received additional payment from the owner for this work, barring Traco's claim pursuant to the last sentence of Paragraph 26 of the subcontract. (D. Ex. 51). That finding should not be disturbed.

V. THE TRIAL COURT APPROPRIATELY ENFORCED LIEN WAIVERS EXECUTED BY TRACO THAT BARRED MANY OF ITS CHANGE ORDER CLAIMS.

Two releases are relevant here: (1) a UVSC release cutting off claims for all labor and materials provided on or before April 30, 2001. D. Ex. 63; and (2) a Weber State release cutting off claims for all labor and materials provided on or before August 31, 2001. (D. Ex. 12).

A. Traco has Failed to Marshall Evidence Supporting the Trial Court's Lien Release Ruling.

In discussing the Trial Court's ruling on lien releases, Traco has failed to address its efforts to create an ambiguity in the language of the releases. The releases state that Traco was releasing "all rights to . . . claims . . . for labor and materials furnished on or before [date]." Traco argued at trial that this language only has reference to contract work, and change order work is therefore not waived; indeed, according to Traco, the lien releases only waive claims for the dollar amounts set forth therein. In support of this interpretation, Traco's witnesses testified that Comtrol personnel had represented that the lien releases only

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[6]Had Traco been concerned about protecting itself, even without agreements with Comtrol and/or Dwamco for this work, it could have made a payment bond claim, asserting that it had provided labor and/or materials to the project, and had not been paid. It failed to do so.

had reference to contract payments, not change orders. (See, e.g., R-1046 at 221, ll. 3 - 18; R-1046 at 231, ll. 5 - 19; R-1048 at 595, l. 16 - 596, l. 596). In fact, Traco's secretary testified that she considered the effective date set forth in the release meaningless. (R-1048 at 599, ll. 7 - 11).

When asked to name the Comtrol representatives who had been involved in these conversations, Traco identified Brian Burk (R-1046 at 231, ll. 13 - 19), Sharon Zobell (R-1046 at 231, l. 23; R-1046 at 232, ll. 8 - 12), and Brian Burk's wife, Shauna Burk (R-1046 at 231, ll. 24 - 25). However, each of these witnesses, in turn, denied ever having such a conversation with a Traco representative. (See, R-1049 at 796 - 801, Sharon Zobell denying ever discussing effect of lien releases with Traco representatives; R-1049 at 858, l. 21 - 859, l. 11, Shauna Burk denying ever communicating with Traco regarding legal effect of a lien release; R-1049 at 939, l. 8 - 940, l. 5, Brian Burk denying such a conversation). Traco completely eliminated from its brief any mention of this fact dispute (which required careful weighing of credibility by the Trial Court). The Trial Court weighed the testimony and found in favor of Comtrol. This Court should affirm the Trial Court's findings where there is evidence supporting such findings.

B. The Trial Court Correctly Interpreted Unambiguous Lien Releases.

Even more importantly for Traco's assertion that the lien releases did not release change order claims, no such interpretation appears on the face of the unambiguous documents. Traco's argument was therefore based solely on parol evidence, and was therefore properly rejected based on a long line of Utah precedent which prohibit such

evidence in interpreting unambiguous lien releases. See, e.g., Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 753 (Utah 1990) (stating that trial court had properly refused to consider parol evidence on meaning of lien release where language was susceptible of only one interpretation); Niederhauser Builders and Dev. Corp., 824 P.2d 1193, 1196 (Utah Ct. App. 1992) (upholding summary judgment ruling that builder had waived its right to file a lien on property for all work and materials predating unambiguous lien waiver).

This Court should affirm the Trial Court's findings.

VI. THE ATTORNEYS' FEES AWARD SHOULD NOT BE DISTURBED.

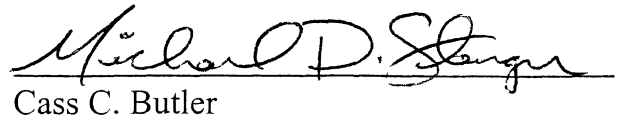
Traco's attorneys' fees argument appears to be an afterthought, meant solely to illustrate that if Traco had won at trial, Traco would have been entitled to its attorneys fees. Traco did not win at trial, however. Because the Trial Court's rulings that gave rise to an award of attorneys' fees to Comtrol are legally sound and should not be overturned, the attorneys' fees award itself should also stand.

CONCLUSION

WHEREFORE, Comtrol respectfully requests that this Court deny Traco's appeal in its entirety.

DATED this 16th day of May, 2007.

CALLISTER NEBEKER & McCULLOUGH

By: 

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of **APPELLEE'S BRIEF** was served by United States mail, first class postage prepaid, on the 18th day of May 2007, on the following:

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